**IN THE SUPREME COURT OF MISSOURI**

**STATE OF MISSOURI, ex rel.**
**STEVE DOWDY AND KIERRA DOWDY, A MINOR,**
**BY AND THROUGH HER FATHER AND**
**NEXT FRIEND, STEVE DOWDY,**

**Relators,**

**vs.**

**THE HONORABLE MARGARET M. NEILL AND THE HONORABLE BARBARA W. WALLACE,**

**Respondents.**

**Case No. SC84400**

# RELATORS' BRIEF


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## JURISDICTIONAL STATEMENT

The matter before this Court is Relators' Petition for Writ of Prohibition and Mandamus in which Relators assert that Respondent, the Honorable Margaret M. Neill, exceeded her authority by transferring the underlying case from a court of proper venue as determined by RSMo. §508.040 and argue a permanent order of prohibition and/or mandamus should be issued prohibiting Respondent, the Honorable Barbara W. Wallace, Presiding Judge of the Circuit Court of St. Louis County, from exercising jurisdiction over this matter except to retransfer venue in the underlying cause to the City of St. Louis, Missouri and further ordering Respondent Judge Neill to vacate her March 18, 2002 order transferring venue from the City of St. Louis Circuit Court. This Court has jurisdiction of this original writ proceeding under Article V, Section 4, of the Missouri Constitution.

## STATEMENT OF FACTS

Relator Steve Dowdy is the surviving husband and Relator Kierra Dowdy is the child of Tammy J. Dowdy, who died as a result of a collision between Defendant Burlington Northern and Santa Fe Railway Company's train and an automobile operated by Tammy Dowdy on August 23, 1999 in Phelps County, Missouri. (Ex. C, Plaintiffs' First Amended Petition for Wrongful Death; Answer of Respondents to Petition for Writ of Mandamus and/or Prohibition, ¶2).[1]

Defendant Burlington Northern and Santa Fe Railway Company is a railroad company that owns, controls or operates a railroad running into or through two or more counties of Missouri including the City of St. Louis, Missouri. (Answer of Respondents to Petition for Writ of Mandamus and/or Prohibition, ¶3). The defendant is not a Missouri corporation. It is a Delaware corporation that does business within the City of St. Louis, Missouri. (Answer of Respondents to Petition for Writ of Mandamus and/or Prohibition, ¶4). Defendant is also a "railroad corporation" as defined under Missouri law in §388.010 and possesses certain powers set forth in §388.210, RSMo. (Ex. C, Plaintiffs' First Amended Petition for Wrongful Death, ¶5; Ex. J, Answer of Defendant, ¶4).

Relators filed suit for the wrongful death of Tammy Dowdy on November 22, 1999 in the City of St. Louis, Missouri against Defendant Burlington Northern and

[1] All citations to exhibits, unless otherwise noted, refer to the exhibits attached to Relators' Petition for Writ of Prohibition and Writ of Mandamus.

Santa Fe Railway Company as the sole defendant. (Ex. A, Plaintiffs' Petition for Wrongful Death; Answer of Respondents to Petition for Writ of Mandamus and/or Prohibition, ¶7). Venue was premised, pursuant to §508.040, on Defendant's operation of its railroad in the City of St. Louis. (Ex. A, Plaintiffs' Petition for Wrongful Death, ¶ 5). Section 508.040, RSMo., provides that "in case the corporation defendant is a railroad company owning, controlling, or operating a railroad running into or through two or more counties in this state, then venue is proper in either of such counties . . . ." On December 16, 1999, Relators filed an amended petition adding William A. Drapp, the engineer of the train involved in the accident and a resident of Franklin County, as a defendant. (Ex. C, Plaintiffs' First Amended Petition; Answer of Respondents to Petition for Writ of Mandamus and/or Prohibition, ¶9).

After its engineer was joined as a defendant, Burlington Northern embarked upon serial attempts to avoid having this case litigated in the City of St. Louis where it runs tracks and does business. Burlington Northern's efforts to avoid St. Louis City venue began on January 7, 2000, when it filed a Motion to Dismiss or Transfer for Improper Venue. (Ex. D, Defendant's Motion to Dismiss or Transfer for Improper Venue and Alternative Motion to Dismiss for Forum Non Conveniens). That effort was followed by another on February 16, 2000, when counsel for Burlington Northern, who also represented the railroad's engineer, William Drapp, filed a venue motion on behalf of Defendant Drapp seeking to dismiss or transfer for improper venue. (Ex. E, Defendant's Motion to Dismiss or Transfer for Improper Venue and Alternative

Motion to Dismiss for Forum Non Conveniens). Then, on September 6, 2000, Burlington Northern filed an Amended Motion to Dismiss or Transfer for Improper Venue and Alternative Motion to Dismiss for Forum Non Conveniens. (Ex. F, Amended Motion to Dismiss or Transfer for Improper Venue and Alternative Motion to Dismiss for Forum Non Conveniens).

Although Judge Michael B. Calvin denied the venue motions referenced above on September 6, 2000, (Ex. G, Order of September 6, 2000), Burlington Northern did not cease its attempts to avoid litigating this case in the City of St. Louis. Nor did it stop when, on November 2, 2001, plaintiffs dismissed the railroad's engineer as a party pursuant to Rule 67.02. (Ex. H, Dismissal of Defendant William Drapp). Instead, on November 12, 2001, a "Memorandum" was filed purported to renew the amended venue motion of Defendant Burlington Northern and Santa Fe Railway Company and Defendant William Drapp, despite the fact Drapp had been dismissed from the case. (Ex. I, Memorandum filed November 12, 2001). However, instead of seeking a ruling on its November 12, 2001 venue memorandum, Burlington Northern took another tack in its quest to avoid venue in the City of St. Louis and removed this case to the United States District Court for the Eastern District of Missouri on December 6, 2001. (Ex. K, Order of Judge Limbaugh of January 18, 2002). The Eastern District rejected Burlington Northern's attempt to remove and remanded the case to the Circuit Court for the City of St. Louis on January 18, 2002. (Ex. K, Order of Judge Limbaugh of January 18, 2002).

On March 18, 2002, Respondent Judge Neill issued her order granting "defendant Railroad's amended motion to transfer venue" and transferring venue to the Circuit Court of St. Louis County "pursuant to Section 476.410, RSMo." (Ex. B, Order of March 18, 2002, p. 3-4). In her order, Respondent Judge Neill relied upon this Court's decision in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), which she concluded held that "an amended petition is considered in determining venue." (Ex. B, Order of March 18, 2002, p. 3). Judge Neill held that "based on the parties before the court at the filing of the first amended petition, venue is proper in Phelps County, Franklin County, or St. Louis County, but not in the City of St. Louis." (Ex. B, Order of March 18, 2002, p. 3). Thus, because of Linthicum, Respondent Judge Neill concluded that the City of St. Louis, where the sole remaining defendant admittedly does business and runs tracks, was an improper venue, but that Franklin County, where no original or remaining party resides and which has no other connection to this litigation was a proper venue, as was St. Louis County, whose only demonstrated relationship to this litigation is that the foreign corporation Burlington Northern chose to designate as its registered agent for service of process, The Corporation Company, is now located there. Id.

Relators filed a Petition for Writ of Prohibition and Writ of Mandamus on March 26, 2002 in the Missouri Court of Appeals, Eastern District, which was denied on April 11, 2002. (Ex. L, Order of April 11, 2002) Thereafter, on April 16, 2002,

Relators filed their Petition for Writ of Prohibition and Writ of Mandamus in this Court, and this Court granted its alternative writ of mandamus on May 28, 2002.

## STANDARD OF REVIEW

Relators have asked for a Writ of Prohibition and a Writ of Mandamus. This is an original proceeding, not an appeal, and therefore does not involve an appellate standard of review.

Prohibition is not a writ of right, but is an extraordinary remedy to prevent the exercise of extrajurisdictional power. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999). When "a court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court . . . . In Missouri, prohibition will not lie to control administrative or ministerial functions, discretionary actions, or legislative powers." Id. (citations omitted.) However, "a court which acts when venue is not proper has acted in excess of its jurisdiction." *State ex rel. East Carter County R-II School District v. Heller*, 977 S.W.2d 958, 959 (Mo. App. 1998) (citations omitted.)

"A writ of mandamus is appropriate only when the respondent has a clear duty to perform a certain act." *Williams v. Gammon*, 912 S.W.2d 80, 83 (Mo. App. 1995). A writ of mandamus is utilized to coerce performance of a duty already defined by law, and its purpose is to ensure that the duty is executed, not to adjudicate. Id. In ruling upon an application for a writ of mandamus, the Court considers whether the relator has a clear, unequivocal, specific, and positive right to have performed the act demanded. *State ex rel Casey's General Stores, Inc. v. City of West Plains*, 9 S.W.3d

712, 715 (Mo. App. 1999). Mandamus "will lie to compel the undoing of a thing wrongfully done." *State ex rel. Todd v. Romines*, 806 S.W.2d 690, 691 (Mo. App. 1991). Writs of mandamus have been issued as a remedy in cases where a motion to transfer venue has been improperly granted. See, e.g., *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901 (Mo. banc 1996).

As noted in *State ex rel. Palmer v. Goeke*, 8 S.W.3d 193, 196 (Mo. App. 1999), "[w]hen the erroneous transfer of a case to another venue has already occurred, Missouri appellate courts have variously relied on both mandamus and prohibition to remedy the error." The appropriate respondents apparently include the presiding judge of the court to which the case has been erroneously transferred as well as the judge that issued the transfer order being vacated. Id. at 197.

## POINTS RELIED ON

## POINT I

**RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER THE UNDERLYING CASE TO THE CITY OF ST. LOUIS AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS IN THAT THE DEFENDANT IN THE UNDERLYING CASE DOES BUSINESS IN THE CITYOF ST. LOUIS AND OPERATES A RAILROAD IN THE CITY OF ST. LOUIS AND THE APPLICATION OF ACCEPTED CANONS OF STATUTORY CONSTRUCTION AND RECOGNITION OF THE LEGISLATIVE INTENT EXPRESSED IN §508.040 SUBJECTS A CORPORATION TO VENUE IN ANY COUNTY WHERE IT DOES BUSINESS OR WHERE IT OPERATES A RAILROAD.**

*State ex rel SSM Health Care of St. Louis v. Neill*, 2002 W.L. 1364121 (Mo. banc 2002)

*State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991)

*State ex rel. Henning v. Williams*, 131 S.W.2d 561 (Mo. banc 1939)

*State ex rel. City of Springfield v. Barker*, 755 S.W.2d 731 (Mo. App. S.D. 1988)

Section 508.040, RSMo. (2000)

Section 508.010, RSMo. (2000)

## POINT II

**RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER THE UNDERLYING CASE TO THE CITY OF ST. LOUIS, MISSOURI AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS EVEN IF §508.010, RSMO., IS APPLIED IN THAT BURLINGTON NORTHERN IS A FOREIGN CORPORATION AND §351.375, RSMO., DOES NOT APPLY TO FOREIGN CORPORATIONS OR SET THEIR RESIDENCE FOR PURPOSES OF DETERMINING VENUE UNDER §508.010, RSMO., EXCLUSIVELY WHERE THE CORPORATION LOCATES ITS REGISTERED OFFICE.**

*State ex rel. Henning v. Williams*, 131 S.W.2d 561 (Mo. banc 1939)

*State ex rel. Smith v. Gray*, 979 S.W.2d 190 (Mo. banc 1998)

*State ex rel. Stam v. Mayfield*, 340 S.W.2d 631, 634 (Mo. banc 1960)

*State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991)

Section 351.588, RSMo. (2000)

Section 351.375, RSMo. (2000)

Section 508.040, RSMo. (2000)

Section 508.010, RSMo. (2000)

## POINT III

**RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDCITION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER TO THE CITY OF ST. LOUIS, MISSOURI, AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE THIS COURT SHOULD RECONSIDER ITS DECISION IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO. BANC 2001) IN THAT THE LINTHICUM DECISION WAS NOT CONSISTENT WITH THE PURPOSE OF MISSOURI VENUE STATUTES; WAS CONTRARY TO CANONS OF STATUTORY CONSTRUCTION AND MISSOURI APPELLATE COURT PRECEDENT; FAILED TO RECOGNIZE THE INTERRELATIONSHIP OF JOINDER AND VENUE; AND WAS BASED UPON A MISUNDERSTANDING OF *STATE EX REL DEPAUL HEALTH CENTER V. MUMMERT*, 870 S.W.2D 820 (MO. BANC 1994) AND THE SIGNIFICANCE OF ITS SEVERANCE OF VENUE AND PERSONAL JURISDICTION ISSUES.**

*State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001)

*State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994)

*Oney v. Pattison*, 747 S.W.2d 137 (Mo. banc 1988)

*State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. banc 1986)

Section 508.040, RSMo. (2000)

Section 508.010, RSMo. (2000)

## POINT IV

**RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER IT TO THE CITY OF ST. LOUIS AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS IN THAT THE UNDERLYING CASE WAS ORIGINALLY BROUGHT AGAINST BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, A SINGLE CORPORATE DEFENDANT OPERATING A RAILROAD AND DOING BUSINESS IN THE CITY OF ST. LOUIS, BURLINGTON NORTHERN IS CURRENTLY THE SOLE DEFENDANT, AND RESPONDENT JUDGE NEILL MISAPPLIED AND/OR MISINTERPRETED THIS COURT'S DECISION IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO. BANC 2001) IN FINDING ST. LOUIS CITY VENUE IMPROPER AGAINST BURLINGTON NORTHERN.**

*State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001)

*State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994)

*Bellon Wrecking and Salvage Company v. David Orf, Inc., et al.*, 983 S.W.2d 541, 547 (Mo. App. 1998)

Section 508.010, RSMo. (2000)

Section 508.010(3), RSMo. (2000)

Section 508.010(4), RSMo. (2000)

Section 508.040, RSMo. (2000)

## INTRODUCTION

> "The primary purpose of Missouri's venue statutes is to provide a convenient, logical, and orderly forum for the resolution of disputes."
>
> *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo. banc 1993).
>
> "It is desirable to arrive at a result where venue is applied more uniformly so that a myriad of venue rules do not exist contributing to and encouraging litigation relating to venue problems."
>
> *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991).
>
> "'Contrariwise,' continued Tweedledee, 'if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic.'"
>
> LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND, Chapter 4 (1865).

A Missouri attorney attempting to reconcile Missouri venue statutes with the past eighty years of judicial interpretations of those statutes should not be blamed if he or she feels a certain kinship with Alice. Commentators[2] and jurists have found many of the venue decisions confusing and illogical; but most mischievously, attorneys have found the law changeable and unpredictable. The conflicting decisions and tortured

[2] See, e.g., Steven Rineberg, *Twisted Currents: Navigating Through Corporate Venue in Missouri and the Quest to Simplify Its Construction*, 45 St. Louis L. J. 1055 (Summer 2001).

statutory constructions have culminated in the present posture of the underlying case, where a statutory directive which specifically governs corporate venue, stating that lawsuits "shall be commenced" against corporations where they do business (or in this case where a railroad company operates) has been rendered meaningless as to foreign corporations. Those entities can restrict venue by creating a mail drop, known as a registered office, or remove to federal court. If Respondent Judge Neill's order is upheld, and Burlington Northern's argument accepted, Burlington Northern, a foreign corporation, could never be sued in the venues provided by §508.040 without its acquiescence. If joined with an individual defendant, Burlington Northern contends that §508.010, rather than §508.040, applies, and it resides only at its registered office. If Burlington Northern is sued alone, with jurisdiction in the state court premised upon §508.040, as a foreign corporation, Burlington Northern can remove the case to federal court; and, if a plaintiff sues the railroad as a sole defendant, then adds one of the railroad's employees as a party to the litigation, this Court's decision in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), compels the trial court where the litigation is pending to ignore the original pleading, with venue premised upon §508.040, and redetermine venue under §508.010. Linthicum is the final nail in the coffin of §508.040 with respect to foreign corporations and has rendered the statute, as to such corporations, virtually meaningless.

Something is clearly wrong with an interpretation of Missouri venue statutes that results in a court's order that a foreign corporation and railroad company, which

operates in the City of St. Louis, cannot be sued in the City of St. Louis, but the case can be tried in Franklin County simply because that county was the residence of a Missouri individual who was added to the litigation after suit was filed, but at the time of the Court's ruling was no longer a party.

Relators' Brief points out that *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001) is distinguishable from the case at bar, so that if the Court decides to continue a case-by-case analysis of Missouri venue, the underlying litigation should be retransferred to the City of St. Louis. However, the main purpose of this Brief is to urge the Court to reconsider flawed decisions on venue and clarify that Missouri venue statutes should be construed in a consistent, logical and predictable manner and that corporations doing business in Missouri may be sued, absent a specific statutory directive to the contrary, in any county in Missouri in which they do business, and that once appropriately established, venue cannot simply vanish.[3]

[3] "Vanishing venue" is a term of art in Georgia owing to the peculiarity of the Georgia Constitution. Georgia has attempted "to provide for a fair and more predictable rule of venue . . . [and] to eliminate the waste of time and resources to courts and parties under the vanishing venue doctrine." *Robinson v. Stargas of Hawkinsville, Inc.*, 533 S.E.2d 97 (Ga. App. 2000), which Georgia legal commentators revile. "The venerable principle of vanishing venue was well established at the turn of the century. These authors hope that the venerable principle will not make it to the turn of the next one." 50 Mercer L. Rev. 359, 380, fn. 63.

## ARGUMENT

**I. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER THE UNDERLYING CASE TO THE CITY OF ST. LOUIS AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS IN THAT THE DEFENDANT IN THE UNDERLYING CASE DOES BUSINESS IN THE CITYOF ST. LOUIS AND OPERATES A RAILROAD IN THE CITY OF ST. LOUIS AND THE APPLICATION OF ACCEPTED CANONS OF STATUTORY CONSTRUCTION AND RECOGNITION OF THE LEGISLATIVE INTENT EXPRESSED IN §508.040 SUBJECTS A CORPORATION TO VENUE IN ANY COUNTY WHERE IT DOES BUSINESS OR WHERE IT OPERATES A RAILROAD.**

**Historical perspective: the failure of Missouri Courts to properly apply §508.040, RSMo., is the result of flawed legal precedent.**[4]

The current state of Missouri venue law is this: Venue is determined solely by statute. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). Specific venue statutes take precedence over general statutes. *State ex rel SSM Health Care of St. Louis v. Neill*, 2002 W.L. 1364121 (Mo. 2002). Missouri has a general venue statute, §508.010, RSMo.[5], and a statute which specifically sets venue in suits against

[4] This heading, and the others that appear in this brief, are not intended to be separate points or even subpoints. They are included merely for the Court's convenience as an aid in locating sections of Relators' argument.

[5] Missouri's general venue statute provides in pertinent part:

**508.010. Suits by summons, where brought**

Suits instituted by summons shall, except as otherwise provided by law, be brought:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

corporations (and is even more specific for lawsuits against railroad companies), §508.040, RSMo.[6] As currently interpreted, the specific corporation statute is meaningless as to foreign corporations. If a resident individual is joined as a co-defendant with a foreign corporation, the corporation may restrict the plaintiff's choices of venue by where it locates its registered agent. If a resident is not joined as a co-defendant, the corporation may remove the case from state to federal court.

In the underlying case, the plaintiffs brought suit against Burlington Northern, a corporation admittedly doing business and operating a railroad in the City of St. Louis.

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(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state; . . .

[6] Missouri's specific statute on corporate venue is as follows:

**"508.040. Suits against corporations, where commenced**

Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

When suit was filed, venue in the City of St. Louis was unquestionably proper. The plaintiffs later amended their petition to join the engineer, but he had been dismissed prior to Respondent Judge Neill's ruling. Nevertheless, Judge Neill relied on what she believed to be controlling authority and transferred the case from the City of St. Louis. This strange but true situation is the product of a long line of Missouri cases which have held that §508.040 is applicable only when a corporation is a sole defendant or when one or more corporations are sued; but when one or more corporations are sued with an individual, venue is determined by §508.010(2), and in that situation the "residence" of the corporate defendant is in the county where its registered agent is located. See for example, *State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo. 1979) and *State ex rel. Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273 (Mo. banc 1984). However, while this mantra is routinely recited by Missouri courts, it is always without analysis. Instead, opinions like Dick Proctor Imports rely blindly, directly or indirectly, on *State ex rel. O'Keefe v. Brown*, 235 S.W.2d 304 (Mo. banc 1951). That decision spawned the idea that when a corporation is joined with an individual, the more specific corporate venue statute, §508.040, becomes meaningless.

In O'Keefe, the plaintiff was injured in a collision with a bus operated by Crown Coach Company, a corporation, and an automobile operated by O'Keefe, a resident of Greene County. When suit was filed in Dade County, where Crown Coach did business, O'Keefe sought a writ of prohibition. Ironically, this case, which has led to the evisceration of §508.040, was not really concerned with §508.040 or any of its

predecessors. Instead, the plaintiff in O'Keefe premised venue on §5735, as amended, Laws 1943, p. 862 (a predecessor to §508.070), which provided that "suit may be brought against any motor carrier or contract hauler . . . . in any county where the defendant maintains an office or agent." The Court, without any reasoning or attempt at statutory interpretation, dismissed the applicability of §5735 by baldly asserting, "It is a permissive venue statute relating solely to suits brought against motor carriers and contract haulers . . . ."

If the opinion had simply stopped there, even though deeply flawed, it would have left no permanent blemish on venue in Missouri. However, the Court went further and claimed to base its opinion on precedent as follows:

> A well-considered opinion in the case of *State ex rel. Columbia National Bank of Kansas City v. Davis*, 284 S.W. 464 (Mo. banc 1926) holds: 'Our conclusion therefore is that the second subdivision of Section 1177 R.S. 1919 (871 Mo. R.S.A.) [now Section 508.010], fixes the venue of civil actions against corporations where they are joined as defendants with one or more other defendants, and that Section 1180 (8704 Mo. R.S.A.) [now Section 508.040] fixes such a venue only in actions where the corporation defendant is the sole defendant.'

235 S.W.2d at 306.

The Court then determined that the legal residence of the corporate defendant was "fixed by the location of its registered agent" relying on §4997.10, Mo. R.S.A.

(now Section 351.375), which stated: "the location or residence of any corporation shall be deemed for all purposes to be in the county where its registered agent is maintained . . . this rule applies with equal force to venue statutes." For this proposition, the Court cited *State ex rel. Columbia National Bank v. Davis*, 284 S.W. 464 (Mo. banc 1926) and *State ex rel. Henning v. Williams*, 131 S.W.2d 561 (Mo. banc 1939), as authority. 235 S.W.2d at 306.

The O'Keefe opinion, the root cause of the present incongruity regarding venue, misunderstood the cases it relied on, particularly Columbia National Bank. While Columbia National Bank did contain the narrow statement referred to in O'Keefe that the predecessor of §508.010 fixed civil actions against corporations joined with individual defendants, nothing in Columbia National Bank held, or even referred to, that statute as the exclusive method of determining venue for suits against corporations when joined with an individual co-defendant. In Columbia National Bank, the Court was not concerned with whether or not venue could lie against a corporation where it was doing business. Instead, the Court viewed the predecessor of §508.040 as a statute that might limit venue against corporations, and stated that: "The question for decision is: can an action against a corporation and another defendant be maintained in the county where such other defendant resides, although the cause of action did not accrue there and the corporation does not have an office or agent in such county?" 284 S.W. at 466. (Emphasis supplied.)

In Columbia National Bank, this Court never attempted to answer the question of whether an action can be maintained against a corporation and an individual defendant where the corporation does business. However, the reasoning of Columbia National Bank leads to the inescapable conclusion that it can. The opinion in Columbia National Bank stated that, "We must harmonize the two provisions and obey one of the first canons of interpretation. Sections 1177 (now §508.010) and 1180 (now §508.040) should be construed together and a meaning given to each which will not destroy the other, if this can be done." 284 S.W. at 470. (Emphasis supplied). In fact, when this Court did consider the question of whether a Missouri resident could be sued in the county where a foreign corporation did business, the opinion relied upon the decision in Columbia National Bank, and found that venue was proper in the county where the corporation did business. *State ex rel. Henning v. Williams*, 131 S.W.2d 561 (Mo. banc 1939).

Unlike the Court's later opinion in O'Keefe, the Henning opinion actually considered the reasoning behind the holding in Columbia National Bank, namely that the general venue statute "must be construed in pari materia with other cognate statutes." 131 S.W.2d at 563. The Court then applied that basic rule of statutory construction and held that since when:

> foreign or domestic corporations are sued alone, the venue of actions against them is in 'any county where such corporation shall have or usually keep an office or agent for the transaction of their usual and

> customary business,' we can see no reason why their residency should not be regarded as established in the same way when, perchance, they are joined as defendants with another, thereby fixing the venue under Section 720 [now §508.010].

131 S.W.2d at 565.

Thus, in 1939, the interpretation of Missouri's statutes determining venue was logical and consistent. All statutes were given effect and in particular the statute that specifically determined venue against corporations and railroad companies as where they did business was given appropriate weight.

Unfortunately, O'Keefe not only overemphasized the statute on registered agents, §351.375, it completely misapplied Columbia National Bank and Henning when it did so. When O'Keefe stated, without analysis, that, "the location or residence of any corporation shall be deemed for all purposes to be in the county where its registered agent is maintained," citing the predecessor of §351.375, and that, "this rule applies with equal force to venue statutes", the opinion relied on State ex rel. Columbia National Bank v. Davis and State ex rel. Henning v. Williams as authority. However, as already discussed, the reasoning of Columbia National Bank and the holding in Henning were quite to the contrary. Furthermore, no statute like §375.351 had even been passed when those cases were decided, so they clearly did not confirm that for venue purposes the residency of a corporation was that of its registered agent;

and, more importantly, both opinions emphasized the importance of giving effect to the specific directives of the statute on corporate venue.

When put into proper perspective, Columbia National Bank, whose misapplication by the O'Keefe Court has confused Missouri corporate venue law for over fifty years, was never intended to eliminate from consideration the legislative intent demonstrated by §508.040 and its predecessors. On the contrary, the reasoning of Columbia National Bank gave effect to that legislative intent and the Court in Henning explicitly recognized that reasoning, as well as the importance of the corporate venue statute. The passage of the general business code in 1943, and the section on registered agents, has never been tied in any meaningful analysis to venue statutes except by the O'Keefe opinion's mis-citation of Columbia National Bank and Henning. Judge Hyde was correct when he dissented in the case of *State ex rel. Whiteman v. James*, 265 S.W.2d 298 (Mo. banc 1954). After the majority opinion relied on O'Keefe, Judge Hyde pointed out that, "Section 351.375 subdivision 4 . . . is not a venue statute; I do not think this general provision should be held to control over the specific provisions of Sections 508.010 and 508.040." 265 S.W.2d at 301 (Hyde, J., dissenting).[7]

[7] In his dissent to *Sperry Corporation v. Corcoran*, 657 S.W.2d 619 (Mo. banc 1983), Judge Blackmar echoed Judge Hyde when he stated, "One might wonder whether a corporation statute would be effective to modify the venue statutes under the rule of

When confronted with the lack of analysis and misunderstanding of earlier cases that propagated the present statutory construction, rejecting the final vestige of the already overruled *State ex rel. O'Keefe* and its progeny is not a radical departure from precedent. Rather than continue to create exceptions to avoid the bad results which have arisen as a result of the lack of regard given to the clear legislative intent of the corporate venue statute (§508.040) by O'Keefe and the cases which have blindly followed, the Court should return to the clear reasoning of Columbia National Bank and Henning, particularly in light of modern realities, and offer a new, coherent and consistent interpretation of the statutory framework of venue which gives appropriate meaning to each and every venue statute.

**The proper statutory construction of §508.040 and §508.010 would give effect to each statute.**

In Mixed Opinions and Maxims, Number 137 (1879), Friedrich Nietzsche observed that, "the worst readers are those who proceed like plundering soldiers: they pick up a few things they can use, soil and confuse the rest, and blaspheme the whole." The manner in which Missouri's venue statutes are presently construed not only offends the clear legislative intent of §508.040, for corporations to be subject to suit wherever they do business in the State of Missouri, or a railroad company wherever they operate; the piecemeal and inconsistent interpretations of venue mock the whole

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*State ex rel. McNary v. Stussie*, 518 S.W.2d 630 (Mo. banc 1974). 657 S.W.2d at 625, fn. 3.

of the statutory venue framework. Present interpretations of those statutes, particularly §508.040 and §508.010, are completely contrary to at least two established canons of statutory interpretation. The first, the judicial equivalent to Nietzsche's statement is that:

> Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or the interpretation of any of its provisions, all acts relating to the same subject or having the same general purpose should be read in connection with it, as together constituting one law. Endeavors should be made, by tracing the history of legislation of the subject to ascertain the uniform and consistent purpose of the Legislature . . . so far as reasonably possible, the statutes although seemingly in conflict with each other, should be harmonized and force and effect given to each, as it will not be presumed that the Legislature in the enactment of a subsequent statute intended to repeal an earlier one unless it had done so in express terms.

(Emphasis supplied). *State ex rel. Columbia National Bank of Kansas City v. Davis*, 284 S.W. 464 at 470 (Mo. banc 1926).

This rule of statutory interpretation and its specific application to venue statutes was reaffirmed in *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991), where the Court stated that:

> All consistent statutes relating to the same subject are in pari materia and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals . . . Section 508.010 and Section 508.040 are interrelated to the issue of venue and how it is obtained in Missouri. These statutes, therefore, are considered in pari materia.

816 S.W.2d at 200.

As currently applied, Missouri does not give any effect to §508.040 if an individual is joined as a co-defendant, even if that individual is joined as an employee of the corporation. *State ex rel. Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273, 274-275 (Mo. banc 1984); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343, 351 (Mo. banc 1962); *State ex rel. Whiteman v. James*, 265 S.W.2d 298, 300 (Mo. banc 1954); *State ex rel. O'Keefe v. Brown*, 235 S.W.2d 304, 306 (Mo. banc 1951). However, the virtual elimination of §508.040 and frustration of the obvious legislative intent regarding corporate venue has occurred without any explanation as to why §508.040 should not be given more consideration. In fact, the case that originally conceived this result, O'Keefe, did not interpret §508.040 or its predecessors since that case was concerned with the forerunner of §508.070 regarding venue in suits against common carriers. Relators cannot find any cases that explain why §508.040 and §508.010 should not be construed together, whether or not §351.375 determines "residence." If that basic canon of statutory interpretation, to give effect to all statutes

"in pari materia" were followed, it would appear obvious that the legislative intent of §508.040 should not be ignored just because corporations are joined as parties with individuals. Obviously, this was recognized as early as *State ex rel. Henning v. Williams*, 315 S.W.2d 561 (Mo. banc 1939), and as Judge Wolff points out in his concurring opinion in *State ex rel. Smith v. Gray*, 979 S.W.2d 190 (Mo. banc 1998):

> When we construe Sections 508.010 and 508.040, *in pari materia*, as the *Henning* case teaches, it is clear that a corporation for venue purposes may have more than one residence; in fact, its residences are those counties where it has offices for the transaction of its usual business. Rather than to hold that the 1943 business corporation statute somehow amended the venue statute, as the *O'Keefe*, *Dick Proctor Imports*, *Bowden*, and *Whiteman* cases indicate, it would be far better to construe the statutes as being consistent with one another. Where a corporation is statutorily a resident 'for all purposes' of a county where it maintains its registered office, the statute does not make that county the *exclusive* residence of a corporation. The statute, consistent with the venue statute, simply creates another venue choice --- not the exclusive venue residence.

*State ex rel. Smith v. Gray*, 979 S.W.2d at 195 (Mo. banc 1998) (Judge Wolff concurring).

It is clear why §508.040 does not contain the word "residence." The Missouri Legislature never intended for suits against corporations which do business throughout the state or the railroads who have tracks throughout the state to be restricted to one location. When the opinions in Columbia National Bank and Henning define "residence", they do so only as a way of giving effect to §508.040 and this should not have changed with the subsequent enactment of the general business statute. No court has ever explained why passage of the general business statutes and §351.375, a general statute regarding registered agents, overrode the clear legislative intent of §508.040 to allow suits against corporations wherever they do business simply because a corporate defendant is joined with an individual co-defendant. It is a violation of any meaningful statutory construction to assume that §508.040 was repealed by a section that does not even deal with venue, namely §351.375. See for example, *State ex rel. McNary v. Stussie*, 518 S.W.2d 630 (Mo. banc 1974). Repeals by implication are not favored. For example, in *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), this Court pointed out that if the Legislature intended to make a statute impotent, "it could have expressly done so." 717 S.W.2d at 522.

**Section 508.040 is a specific venue statute and should control over more general venue statutes.**

The present application of Missouri's venue statutes violates another established canon of statutory construction which has been approved by Missouri courts and followed strictly with regard to venue statutes other than §508.040.

> The rules of statutory construction are clear that in situations where the same subject matter is addressed in general terms in one statute and as specific terms in another, and there is a necessary repugnancy between the statutes, the more specific statute controls over the general.

*Robinson v. Health Midwest Development Group*, 58 S.W.3d 519, 522 (Mo. banc 2001) (emphasis supplied).

> Where two statutes concerning the same subject matter, when read individually, are unambiguous, but conflict when read together, we will attempt to reconcile them and give effect to both . . . If one statute addresses a subject matter generally while another statute addresses the same subject matter more specifically, the two statutes should be harmonized if possible. But if the conflict between the two statutes cannot be reconciled, the more specific statute must prevail over the general statute.

*Anderson v. Board of Regents of Missouri Western State College*, 58 S.W.3d 581, 587 (Mo. App. W.D. 2001).

Despite these clear judicial pronouncements, the current status of Missouri law as it pertains to corporate venue is that §508.010 and §508.040, both statutes on venue, are not construed together, and, furthermore, the general statute, §508.010, is exalted, and the more specific statute, on corporate venue, §508.040, is rendered meaningless.

Moreover, in the interpretation of venue statutes, Missouri courts have followed this accepted rule of statutory construction, that the more specific statute controls over the more general, strictly in interpreting statutes that restrict venue choices. For example, in *State ex rel. Bella Villa v. Nicholls*, 698 S.W.2d 44 (Mo. App. E.D. 1985), the plaintiff attempted to file suit in the City of St. Louis, where the collision causing the wrongful death of plaintiff's decedent occurred, against a Bella Villa police officer and the City of Bella Villa, a municipal corporation situated entirely in St. Louis County, Missouri. The City of Bella Villa sought a writ of prohibition on the grounds of improper venue arguing that under §508.050 venue was improper. Section 508.050 provides in pertinent part that, "suits against municipal corporations as defendant or co-defendant shall be commenced only in the county in which the municipal corporation is situated . . ." The plaintiff countered, stating that since the municipal corporation was joined with an individual, §508.010 would control. After all, if merely joining an individual defendant with a corporation can make the legislative intent to allow civil actions against corporations wherever they do business as evidenced by §508.040 disappear, then joining a municipal corporation with an individual as co-defendant should make the clear legislative intent to restrict where municipal corporations may be sued set forth in §508.050 similarly evaporate.

However, the Court ruled in Bella Villa that venue was improper in the City of St. Louis because, "Section 508.050 is a special venue statute which pertains only to suits brought against municipal corporations . . . Section 508.010 is a general venue

statute . . . when a general and special statute deal with the same subject matter, the specific statute prevails over the general one." 698 S.W.2d at 45. The Court thus held that §508.050 restricted venue to the county in which the municipal corporation was located, rejecting implicitly, although not explicitly, the reasoning of State ex rel. O'Keefe v. Brown.

This Court was recently faced with a similar question regarding §355.176.4, a special statute dealing with venue in suits against non-profit corporations. In *State ex rel. SSM Health Care St. Louis v. Neill*, 2002 W.L. 1364121 (Mo. 2002), the plaintiff filed a suit against Dr. Bucy, a resident of St. Charles County and SSM Health Care in the City of St. Louis. The plaintiff argued that since an individual was joined with a non-profit corporation, §508.010, the general venue statute, applies and further argued that the residence of SSM Health Care was in the City of St. Louis.[8] The plaintiff argued that, "Missouri courts have held that a similarly worded statute, Section 508.040, governing the venue of suits against for-profit corporations, applies only when such corporations are the sole defendants . . . therefore, by analogy . . . although

[8] The argument on residence was that §355.170, which had provided that a non-profit corporation resides where its registered office is maintained had been repealed, and therefore, pursuant to the reasoning in *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991) the non-profit corporation resided in the City of St. Louis where it did business. Because the Court held that §355.176.4 restricted venue, that argument was not reached.

Section 355.176.4 says that suits against non-profit corporations shall be commenced only in certain venues, that limitation also should be held not to apply when a non-profit corporation is sued together with an individual." 2002 W.L. 1364121, p. 4. The Court acknowledged that to be the current state of the law on venue and that the plaintiff's analogy, "is appealing at first blush," 2002 W.L. 1364121, p. 4, but rejected that analysis holding that the specific statute governed and, "Section 355.176.4 expressly provides the exclusive venues in which a non-profit corporation can be sued in Missouri", 2002 W.L. 1364121, p. 5.

Clearly, Bella Villa and SSM Health Care both rejected the reasoning behind O'Keefe, Bowden v. Jensen, and the other cases that have continued to recite the mantra that when an individual is joined with a corporation, §508.010 governs. See for example *State ex rel. Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273, 275 (Mo. banc 1984). The opinion in Bella Villa did so without discussing those cases. Instead, the Court of Appeals simply recited the established canon of statutory construction, that specific statutes take precedence over general statutes. In SSM Health Care, the Court did discuss cases like *State ex rel. Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273 (Mo. banc 1988), but elected to distinguish those cases by emphasizing the differences between §508.040 and §355.176.4. It is worth looking at that analysis to see whether the distinction between statutes has a substantive meaning for the issues presently before the Court.

In SSM Health Care, the Court stated that plaintiff's analogy "fails to sufficiently take into account the difference in wording between Section 508.040 and Section 355.176.4." The difference, of course, is that while Section 508.040 and Section 355.176.4 both stated that suits "shall be commenced," §355.176.4 used the word "only". For the outcome in SSM Health Care, that difference was determinative, and the Court reached the right conclusion in SSM Health Care. It would have been blatantly offensive to the legislative intent of §355.176.4 to have construed the venue statutes so as to allow a non-profit corporation to be sued anywhere other than the exclusive venues of §355.176.4. The Court was obviously dedicated to carrying out that legislative intent and did so. However, the Court should be just as dedicated to the legislative intent of §508.040. The question before this Court is whether it is any less offensive to the legislative intent of §508.040 not to allow lawsuits to be venued against corporations where they do business, as that statute "requires", based on the fortuity of an individual co-defendant, than it would have been to allow additional venues against non-profit corporations based on the same fortuity.

Clearly, statutes such as §508.050 and §355.176.4 are entitled to more weight than §508.010. Pursuant to accepted statutory construction, if statutes are not repugnant then they should be harmonized, which is what the Court attempted to do in 1926 in Columbia National Bank. To the extent that the statutes cannot be harmonized, it must be the specific statute that is given effect, over the general statute. Although §508.040 does not set an exclusive venue for suing corporations, as does

§508.050 or §355.176.4, it does not follow that §508.040 should be given no effect whatsoever. It is as logical and consistent to allow §508.040 to be an alternate source of venue as it is to make §508.050 and §355.176.4 exclusive venues. The same statutory reasoning and construction is required to give those exclusive venue statutes their effect as intended by the Legislature should also be applied by this Court to statutes, such as §508.040, that provide alternate venues. There is no canon of statutory construction that statutes that limit venue choices are entitled to more judicial sympathy than those that may allow additional venues.

An opinion that demonstrates the appropriate manner to construe Missouri's venue statutes is *State ex rel. City of Springfield v. Barker*, 755 S.W.2d 731 (Mo. App. S.D. 1988). In that case, the Southern District of the Missouri Court of Appeals was faced with a particularly vexing problem of statutory construction. The plaintiff brought suit for damage to a telephone cable against two defendants, both municipal corporations, the City of Fordland situated in Webster County, Missouri, and the City of Springfield in Greene County, Missouri. Suit was filed in Webster County and the City of Springfield sought to prohibit the lawsuit proceeding in Webster County based upon the explicit language of §508.050. That statute provides: "Suits against municipal corporations as defendant or co-defendant shall be commenced only in the county of which the municipal corporation is situated . . . ." (emphasis added). Thus, under the plain language of §508.050, it would appear impossible to obtain proper venue in a lawsuit against more than one municipal corporation, unless they were

situated in the same county. The Court of Appeals pointed out that, "At one time it was held 'the joinder of two or more separate causes of action in a single petition does not create venue as to both causes.' *Sperry Corporation v. Corcoran*, 657 S.W.2d 619, 621 (Mo. banc 1983). However, the relationship between the venue statutes and the statutes and rules pertaining to joinder is now established by *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. banc 1986), overruling Sperry Corporation v. Corcoran." 755 S.W.2d at 733. The Court held:

> In the underlying actions the two municipal corporations are properly joined as defendants. It is impossible to apply Section 508.050. When two municipal corporations of different counties are defendants, the statutes and rules pertaining to joinder, reflecting the public policy referred to above, carve out an exception to §508.050. In such circumstance, an action may be commenced in either county in which a defendant municipal corporation is situated.

755 S.W.2d at 734.[9]

[9] In City of Springfield v. Barker, the Court recognized that in construing venue statutes courts must consider not only a statute's relationship to other venue statutes, but also its relation to statutes and rules governing the joinder of parties. For further discussion of the inter-relationship between venue, civil procedure, and the concept of jurisdiction, see Point III.

Not only was the decision in City of Springfield v. Barker appropriate, but the reasoning was sound. The Court gave effect to all implicated statutes without rendering any meaningless. Under the same reasoning that courts have used to render §508.040 impotent, the Court could have said since §508.050 doesn't apply, §508.010 does. However, to do so would have been to ignore the clear legislative intent of §508.050. The Court instead construed the statutes and rules regarding joinder and the venue statutes harmoniously in a way giving effect to each and proper weight to the specific dictates of §508.050. The decision limits venue against more than one municipal corporation to one of the counties in which a municipal corporation is situated, but at the same time recognizes that venue has to lie somewhere (which implicitly recognizes that venue is no longer jurisdictional) and the absurdity of not allowing venue when a defendant is appropriately joined in a correctly venued case.

The line of cases starting with O'Keefe that ignores the intent of statutes such as §508.040 and §508.070 does indeed "blaspheme the whole" of Missouri's venue law. It has created a confusing, illogical and inconsistent framework for venue. This Court has recognized the importance of interpreting all venue statutes together. See for example, *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991). But the Court has also recognized the importance of giving effect to specific statutes. *State ex rel SSM Health Care of St. Louis v. Neill*, 2002 W.L. 1364121 (Mo. 2002). The deference Missouri courts give to apply §508.050 and §355.176.4 should be extended to §508.040. In truth, it is difficult to conceive of any situation where the

clear legislative intent expressed by a specific statute should be not be given effect; but that has been the result of fifty years of Missouri judicial decisions that rendered §508.040 impotent.

The failure to apply accepted canons of statutory construction so that §508.040 is given effect and not simply rendered meaningless has lead plaintiffs to file suit solely against a corporation and avoid joining individual defendants because they would then implicate the faulty reasoning of O'Keefe, making the obvious legislative intent of §508.040, that corporations could be sued where they do business, subject to the whims of a corporation and where it might contract to locate its registered agent. While the Court's decision in State ex rel. Linthicum v. Calvin implies that a plaintiff who first brings suit against a corporation and then later joins an individual is attempting to evade the dictates of §508.010, if a matter of venue strategy that procedure is followed because of flawed judicial decisions that have evaded the specific dictates of §508.040.

But, of course, if this were all there was to the modern practice of law, there would not exist the present plethora of continuing venue disputes. However, Missouri is part of a federal system; and a federal statute, 28 U.S.C. §1441, provides that an action may be removed from state jurisdiction if the foreign corporation which has chosen to do business in Missouri is not joined with a resident of the State of Missouri. If the residents were often corporations, there would be very little venue litigation. However, the persons on whom corporate liability is predicated under respondeat

superior tend not to be members of professional corporations but individuals, thus triggering the prior reasoning of the Court regarding §508.010 and venue, otherwise proper, simply vanishes.

Even if Missouri courts wish to readily yield jurisdiction, that is clearly not the Missouri Legislature's intent. In 1987, the Missouri Legislature enacted §537.762. Under this statute a defendant whose liability is based solely on its status as an innocent seller may be dismissed from products liability claims. However, the Legislature recognized the realities of the practice of law are that the seller often is the only Missouri resident who is a defendant and a dismissal before the case is one year old (28 U.S.C. §1446(b)) would result in removal of that case to federal court. The Missouri Legislature specifically stated that, "no order of dismissal in this action shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. The party dismissed pursuant to this action shall be considered to remain a party to such action only for such purposes." Section 537.762.6, RSMo. (2000).

The Missouri Legislature has never evidenced any intent to aid the removal of cases from state court. Relators can find no intent evidenced by the Legislature or any Missouri court to relegate state jurisdiction to second-class status. On the contrary, the Missouri Legislature has in the case of product liability cases clearly evidenced an intent not to forfeit state jurisdiction based upon the joinder or non-joinder of a defendant. It is an incongruous result that the legislative intent is that a defendant may

be dismissed within sixty days and yet remain a fictional party to avoid removal in a products liability case, but could not be joined two days after the petition is filed to avoid removal without changing venue.

## II. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER THE UNDERLYING CASE TO THE CITY OF ST. LOUIS, MISSOURI AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS EVEN IF §508.010, RSMO., IS APPLIED IN THAT BURLINGTON NORTHERN IS A FOREIGN CORPORATION AND §351.375, RSMO., DOES NOT APPLY TO FOREIGN CORPORATIONS OR SET THEIR RESIDENCE FOR PURPOSES OF DETERMINING VENUE UNDER §508.010, RSMO., EXCLUSIVELY WHERE THE CORPORATION LOCATES ITS REGISTERED OFFICE.

Although Relators strongly dispute that §508.010 should be applied to determine venue in this case, where a corporation was sued as a sole defendant, if the Court determines that §508.010 does apply, Relators respectfully submit that the residence of a foreign corporation is anywhere it has or usually keeps an office or agent for the transaction of its usual and customary business or, in the case of a

railroad company, in any county where it operates that railroad; in other words, where the Legislature intended a foreign corporation to be sued under §508.040.[10]

In its Answer to Relators' Petition for Writ of Mandamus and/or Prohibition, Respondent has argued not only that §508.010 applies to this case, but that a corporation is deemed to reside only in the county where it maintains its registered agent and office, citing *State ex rel. Whiteman v. James*, 265 S.W.2d 298 (Mo. banc 1954). It continues to maintain that position despite its concession that it is a Delaware corporation doing business in the City of St. Louis. (Answer of Respondents to Petition for Writ, ¶4).

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[10] Although in this point Relators discuss how "residence" should be determined for corporations under §508.010, Relators do not want to be construed as agreeing that the term "residence" has any meaning or significance for corporate venue. As explained in Point I, Relators believe §508.040, which does not use the term "residence", should be used to establish permissible venues in suits against corporate defendants. Relators believe it was a mistake to begin exclusively applying §508.010 to litigation involving corporations and individuals. However, the mistake of only applying §508.010 was compounded by the series of errors discussed in this point. The Court allowed a clause from §351.375.2, a general corporation statute, to control over the specific corporate venue statute's concept of where a corporation is subject to litigation and applied that general corporate statute to foreign corporations such as Burlington Northern, who are specifically excluded from its scope.

Prior to 1943, this Court defined the term "resides" under §508.010 so as to give effect to §508.040. *State ex rel. Henning v. Williams*, 131 S.W.2d 561, 563-564 (Mo. banc 1939). However, in 1943, the Missouri Legislature enacted §4997.10, Mo. R.S.A. (now §351.375, RSMo.), which contained a provision stating that, "the location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained." §351.375.2. A line of cases beginning with *State ex rel. O'Keefe v. Brown*, 235 S.W.2d 304 (Mo. banc 1951) and *State ex rel. Whitman v. James*, 265 S.W.2d 298 (Mo. banc 1954) followed. The former noted the passage of the new law and determined that it did not merely add to the possible residences of a domestic corporation for venue purposes, but fixed the residence of a corporation under §508.010(2) as the location of its registered agent, registered office and principal office. O'Keefe, 235 S.W.2d at 306. The latter, relying on O'Keefe, found no significance in the fact that the corporation before it was foreign, while O'Keefe considered residence of a domestic corporation, and concluded that §351.375 also defined and limited the venue residence of foreign corporate defendants.

Relying upon O'Keefe and Whiteman, Burlington Northern's argument centers around a single, purely administrative fact: its registered agent, The Corporation Company, and registered office are located in St. Louis County. Burlington Northern's argument is clearly wrong.

Burlington Northern is a foreign corporation. The statutory provisions applicable to foreign corporations are separated from those dealing with domestic

corporations. At the beginning of Chapter 351, RSMo., entitled "General and Business Corporations," the Legislature has written the following definition: "'Corporation' or 'domestic corporation' includes corporations organized under this chapter or subject to some or all of the provisions of this chapter except a foreign corporation." §351.015(6), RSMo. (Emphasis added.) The statutes dealing with foreign corporations, grouped under a separate heading, begin at the since repealed §351.570, RSMo. (1986). Section 351.588, RSMo., is the foreign corporation counterpart to §351.375. Although §351.588, like §351.375, contains provisions for maintaining and changing a corporation's registered office or registered agent, §351.588 does not contain the "all purposes" language relied upon by Burlington Northern and this Court in O'Keefe v. Brown and Whiteman v. James. Section 351.588 had, as its predecessor, §351.625, RSMo. 1986. Like §351.588, §351.625 did not contain the "all purposes" language of §351.375. However, it did contain the following clause incorporating portions of §351.375: "Any such change either in the registered office or in the registered agent shall be made in the manner as prescribed in Section 351.375." §351.625, RSMo. 1986. That language is not included in the new statute, §351.588, which does not incorporate any part of §351.375.

Section 351.588 is, therefore, notable for two reasons when considering where a foreign corporation "resides" for venue purposes. First, it does not contain §351.375's "all purposes" language, and second, it deletes entirely §351.625's single reference to §351.375. The Legislature's 1990 enactment of §351.588 should end any argument

that §351.375 is relevant to the residence of a foreign corporation. To the extent that Whiteman and O'Keefe imply to the contrary, they are based upon faulty reasoning and invoke repealed statutory provisions.

The reasoning of State ex rel Whiteman v. James was criticized even before the new statute. *State ex rel. Stam v. Mayfield*, 340 S.W.2d 631, 634 (Mo. banc 1960), disavowed that portion of Whiteman which held that §351.375 governed venue with respect to foreign corporations: "To the extent that it holds that the last sentence of §351.375 is applicable to foreign corporations, State ex rel Whiteman v. James is disapproved". Id. Relators recognize that this Court revisited the issue in *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. banc 1962), concluded that the Stam opinion did not overrule the ultimate decision in Whiteman, and in essence determined that Stam was limited to its facts. Judge Storckman dissented in Bowden, believing that the majority incorrectly construed and applied §351.375, as had the Court in the O'Keefe and Whiteman decisions. He opined that the legislative intent behind §351.375 was to make sure that another place of venue and service was designated, not "to destroy the effectiveness of Clause 2 of Section 508.010 as it had been interpreted and construed in the *Henning* case." Id. at 353 (Storckman, J., dissenting).

In later holdings, this Court has concluded that if §508.010 governs venue and the corporate defendant is an insurance company, the term "resides" includes the locations where the corporations could be amenable to suit under §508.040 if sued alone, because §351.375 excludes any application to insurance companies. *State ex*

*rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991). Thus, according to current Missouri decisions, it is only under the limited circumstance presented by cases such as this where a non-insurance corporation is sued along with a non-corporate defendant that the corporate defendant is allowed to avoid venue in counties where it does business and limit itself to one "residence" for purposes of determining venue.

The erroneous reasoning that has led us to this point appears to be as follows: 1) §508.040 applies only when corporations are the only defendants; 2) §508.010.2 applies to corporations as well as individuals, despite the absence of a specific reference in the statute to corporations; and 3) the "residence" of a domestic non-insurance corporation under §508.010 is determined pursuant to §351.375, even though this nullifies the legislative intent of §508.040, because the "all purposes" language of §351.375 mandates that the residence of the corporation is the location of the registered office.

Regardless of case law based upon earlier versions of the statutes, even this distorted and flawed reasoning cannot be extended further and applied to foreign corporations, because there is no statute pertaining to foreign corporations that compels this Court to overrule the legislative intent expressed in §508.040. Even if this Court continues down the previous path established for domestic corporations, the essential underpinning of the domestic corporation venue decisions, namely the language of §351.375, is specifically excluded from application to foreign corporations

by the definition of "corporation" referenced earlier, and §351.625, the statute that formerly incorporated portions of 351.375 to foreign corporations, has been repealed and replaced. Quite simply, there is no "all purposes" residence language applicable to foreign corporations. And, construing the statutes in pari materia, it is clear the legislative intent is that foreign corporations be sued in venues established by §508.040, whether or not they are the only defendants, because their venue "residence" must be established under §508.010 by reference to §508.040. As to foreign corporations, there is no §351.375 to override the clear terms of §508.040 and no other statute defining a foreign corporation's residence for purposes of venue.

Section 508.040, although it does not use the word "residence", is consistent with the well-recognized principle that corporations are not limited to one residence. *State ex rel. Henning v. Williams*, 131 S.W.2d 561, 564 (Mo. banc 1939), clearly concluded that a corporation may have more than one residence. In *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 192 (Mo. banc 1998), the Court noted, "The *Henning* case follows the common law rule that a corporation's 'residence may be wherever its corporate business is done' . . . and that the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business." Id. at 192 (citations omitted). Indeed, this concept of multiple residences is not confined to corporations. Missouri Courts have recognized that even individual defendants may have more than one place of residence for purposes of §508.010. For example, in *State ex rel. Quest Communications Corporation v. Baldridge*, 913 S.W.2d 366 (Mo.

App. 1996), the Court of Appeals concluded that the individual defendant, Cinelli, who owned a house in Kansas City, Missouri as well as South Padre Island, Texas, was a Missouri resident for venue purposes:

> It is common knowledge that in today's mobile and more affluent society, many people 'go south' for the winter. Owning and residing in two homes is not an uncommon occurrence. To determine that Cinelli is not a Missouri resident ignores this reality. We would reach an absurd and unreasonable result if 'reside' is construed differently.

Id. at 370. In so holding, the Court noted the definition of "residence" in *Black's Law Dictionary*, 1176 (5th Ed. 1979), which describes the differences between residence and domicile as follows, "As 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile." 913 S.W.2d at 370. Certainly, this is true for corporations as well as individuals.

This Court should reject once and for all the holding of *State ex rel. Whiteman v. James*, 265 S.W.2d 298 (Mo. banc 1954) establishing the exclusive residence of foreign corporate defendants as the location of their registered office. The Court properly criticized and disapproved that portion of the Whiteman opinion in *State ex rel. Stam v. Mayfield*, 340 S.W.2d 631, 634 (Mo. banc 1960) because Whiteman applied a domestic corporation statute to a foreign corporation. In any event, the

foreign corporation counterpart to §351.375 continues to omit the "all purposes" language found in §351.375 and no longer incorporates any portion of that domestic corporation statute into the provisions pertaining to registered agents and offices of foreign corporations. This Court can and should give effect to the legislative intent with respect to venue against foreign corporations expressed in §508.040, and find the residence of a foreign corporation under §508.010(2) to be anywhere that corporation is subject to suit under §508.040, RSMo.

**III. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDCITION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER TO THE CITY OF ST. LOUIS, MISSOURI, AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE THIS COURT SHOULD RECONSIDER ITS DECISION IN *STATE EX REL. LINTHICUM V. CALVIN*, 57 S.W.3D 855 (MO. BANC 2001) IN THAT THE LINTHICUM DECISION WAS NOT CONSISTENT WITH THE PURPOSE OF MISSOURI VENUE STATUTES; WAS CONTRARY TO CANONS OF STATUTORY CONSTRUCTION AND MISSOURI APPELLATE COURT PRECEDENT; FAILED TO RECOGNIZE THE INTERRELATIONSHIP OF JOINDER AND VENUE; AND WAS BASED UPON A MISUNDERSTANDING OF *STATE EX REL DEPAUL HEALTH CENTER V. MUMMERT*, 870 S.W.2D 820 (MO. BANC 1994) AND THE SIGNIFICANCE OF ITS SEVERANCE OF VENUE AND PERSONAL JURISDICTION ISSUES.**

With all due respect, Relators submit that this Court should reconsider *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). The brief time that has passed since that opinion was issued has proven sufficient to illustrate that, although undoubtedly the product of good intentions and legitimate concerns, this Court's decision in Linthicum created more problems than it solved. The case at bar illustrates that Linthicum was a step along the wrong path; one that led away from "the purpose of the venue statutes", which "is to provide a convenient, logical, and orderly forum for litigation." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001) (citing *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. banc 1991)). And, although this Court could simply leave the path taken in Linthicum and traipse off into the forest by distinguishing that decision, Relators respectfully submit that it is much more appropriate to return to the fork in the road where Linthicum veered off track.

***State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001) was not consistent with the purpose of Missouri venue statutes.**

After decades of confusion and litigation, during which time Missouri appellate court "holdings about such matters as joinder, third-party practice, and venue [were] not . . . wholly consistent or coherent . . . .", *Sperry v. Corcoran*, 657 S.W.2d 619, 624 (Mo. banc 1983) (Blackmar, J., dissenting), this Court in *Oney v. Pattison*, 747 S.W.2d 137 (Mo. banc 1988) invited the Missouri Legislature to sever the concept of venue and personal jurisdiction and allow trial courts to transfer actions filed in the wrong

venue to a proper venue. The Legislature responded in 1989 by enacting §476.410, RSMo. Cum. Supp. 1993, and amending §506.110. In *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994), this Court was finally able to "overrule a long line of Missouri case law culminating in *Oney v. Pattison*" and hold "that proper venue is no longer a prerequisite to personal jurisdiction . . . ." Id. at 821. Having separated the concepts of venue and personal jurisdiction, this Court went on to hold that, "[b]y the terms of the statute [Section 508.010, RSMo.], venue is determined as the case stands when brought, not when a motion challenging venue is decided." Id. at 822. Thus, a bright line rule was established which determined the propriety of venue based upon the original petition and the parties thereto. The DePaul "bright line rule" was consistently followed by Missouri appellate courts until this Court's decision in Linthicum.

In Linthicum, certainty and order were replaced with disorder, including the possibility of venue transfer at any point in the litigation. Linthicum also created illogical results, such as here, where the temporary presence of Burlington Northern's engineer as a defendant resulted in a change of venue, with venue determined not as this case stood when brought, or when the motion to transfer was decided, but based upon a "halfway back" point that bears no relevance to this suit.[11]

[11] In fact, this case presents circumstances very similar to the second hypothetical presented by Judge Stith in her Linthicum dissent as an example of the myriad, complex and troublesome problems the approach of the principle Linthicum opinion

The chaos that erupted after Linthicum has also resulted in inconvenience to the parties. For example, in this litigation, on March 18, 2002, after more than two years of litigation, the parties lost an agreed to special trial setting of September 16, 2002. Instead of trying the underlying case that week, Relators will be arguing venue issues before this honorable Court. Furthermore, with respect to the venue statutes' purpose of promoting convenience, it is worth noting that there has been no showing, or even any clearly expressed contention, that the City of St. Louis is an inconvenient forum in this litigation. The closest Burlington Northern ever came to making such an assertion was in its initial motion to transfer, where it claimed that the action "has no nexus or connection to the City of St. Louis". If by that statement Burlington Northern meant the cause of action did not accrue there, that could be said about any venue other than

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would create. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 866 (Mo. banc 2001) (Stith, J., dissenting). As in Judge Stith's example, the plaintiffs here originally sued a single defendant in a venue clearly appropriate as to that defendant. Furthermore, as in the hypothetical, the plaintiffs added another defendant who was subsequently dismissed. However, that added defendant's temporary presence is apparently "determinative of venue" under the holding in Linthicum's principle opinion, despite the fact that "the convenience of the location of the suit is . . . absolutely irrelevant and unimportant" to that added and dismissed defendant, who is no longer even a party to the case. Id. In short, what was once a hypothetical problem has now become an unfortunate reality.

the one where the collision occurred, including St. Louis County where this case is now pending, and §508.010 by its express terms presents the venue where the action accrued as only one alternative. If by its statement Burlington Northern meant none of the parties have any "nexus or connection" to the City of St. Louis, that is absolutely incorrect, as it has conceded that it runs a railroad through the City of St. Louis and does business in the City of St. Louis, and it is clear that it could and did expect to be involved in litigation in the City of St. Louis under the specific provisions of §508.040 in which the Legislature determined what venues are appropriate in litigation against railroads. Thus, the transfer in this case, based upon Linthicum, did not remedy inconvenience to the parties created by the venue where the litigation was pending, but, in fact, created inconvenience.

Furthermore, transferring venue of the underlying litigation to St. Louis County was not logical. The order transferring the case was based upon the presence of a party who was not involved in the litigation when venue was originally set and will not be a party at trial.

In summary, instead of providing an orderly forum for the litigation of disputes, Linthicum has resulted in orders that create litigation and disputes.

***State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001) was contrary to Missouri appellate court precedent and canons of statutory construction.**

In Linthicum, this Court, for the first time, held that, "for purposes of Section 508.010, a suit instituted by summons is 'brought' whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition." 57 S.W.3d at 857. Although the principle opinion contended that *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994), "does not hold to the contrary", Judge White's dissent, which contains an excellent discussion of the consistent precedent that developed after DePaul, casts substantial doubt on that claim. As noted by Judge White, "either the majority has overruled these cases sub silentio, or the opinion produces the incongruous result that the word 'brought' is capable of two simultaneous meanings in its singular use in Section 508.010." 57 S.W.3d at 870 (White, J., dissenting). In other words, in DePaul, this Court clearly found the case to have been "brought" when it was originally filed and *ignored the amended pleading* by which the non-corporate defendant was dismissed. In Linthicum, this Court concluded that a suit is "brought" by amended petition "for purposes of Section 508.010" and *ignored the original petition*, an interpretation of §508.010 and the meaning of its language which is impossible to reconcile with that previously adopted by the Court.

The trial court's ruling in this case eliminates any doubt as to which of those interpretations will prevail as the law currently stands. Despite the fact that Burlington Northern was an original defendant, Respondent Judge Neill found the case to have been "re-brought" against Burlington Northern by the amended pleading adding its engineer as a party. That result would be absolutely untenable under DePaul and the

cases following it. There is, as Judge White noted, a singular meaning for the word "brought", which now apparently applies only to the last pleading in which a defendant is added. The principle opinion in Linthicum did indeed "eliminate [ ] the bright line rule concerning venue and offer [ ] in replacement a never ending and unpredictable tide leaving the parties only to guess as to which courthouse door they ultimately will be washed ashore." 57 S.W.3d at 871. (White, J., dissenting).

As pointed out by the Linthicum majority, "'the primary rule of statutory construction is to ascertain the intent of the Legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.'" 57 S.W.3d at 857-858 (quoting *Wolff Shoe Company v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)).

Section 508.010, RSMo., the general venue statute in Missouri, is entitled "Suits by Summons, Where Brought" and provides that "suits instituted by summons shall, except as otherwise provided by law, be brought" in venues described in six subsections. As noted by Judge Stith, "[t]he Legislature's intent to have a single determination of venue at the initiation of the suit is supported by the Legislature's interchangeable use of the words 'brought,' 'commenced' and 'instituted' in other sections of Chapter 508 dealing with venue." 57 S.W.3d at 863. (Stith, J., dissenting). Indeed, the interchangeable use of those terms is found even within the subsections of §508.010 itself. Section 508.010(5) uses the word "commenced". Judge Stith and Judge White, in their dissenting opinions in Linthicum, engaged in extended and well-

reasoned discussions of the meaning and definitions of the words "brought", "commenced" and "instituted" with which Relators concur but see no need to set forth in full in this Brief. Judge Stith concluded that: "In sum, the term 'brought' has been equated with 'instituted' or 'commenced' by the Legislature, the Revisor [of statutes] and even *Black's Law Dictionary* . . . . Self-evidently, all these terms are intended to refer to when suit is first filed and to establish the proper venue of the action at that time." 57 S.W.3d at 863. (Stith, J., dissenting). Judge White found further support for the interpretation that a case is brought, commenced or instituted by filing the petition with the circuit court in this Court's own rules. He noted that, "Rule 53 entitled 'Commencement of Civil Action' states, 'A civil action is commenced by filing a petition with the court.' There is no language in the Court's rules indicating that a civil action is 're-commenced' or 're-brought' upon the filing of an amended petition." Id at 868. (White, J., dissenting). Judge White further pointed out that there is a specific statute, §506.110, entitled "How Suits May Be Instituted in Courts of Record", which echoes this Court's Rule 53 in confirming that, "[t]he filing of a petition in a court of record . . . shall be taken and deemed the commencement of a suit." Id. Section 506.110 must be considered in pari materia with §508.010 and must be read consistently and harmoniously with that general venue statute. Id.

Quite simply, litigation is a process with a distinct beginning, defined by Missouri statutes and court rules as the filing of a petition which commences, institutes, or brings the action. As the litigation proceeds, parties may move their

residence within the state, leave the state, be added to or dropped from the litigation by plaintiffs or defendants through amended pleadings or third-party practice, may die, or, in the case of corporations, may cease to operate and become administratively dissolved by the Secretary of State. See Chapter 351, RSMo. The Legislature has clearly chosen to have venue determined and set when the case is brought, commenced or instituted without respect to the developments noted above which may occur during the litigation. The Legislature did not provide for or intend a game of "musical chairs" where litigants scramble for venue every time the "music" is stopped by some change in parties or their circumstances.

It is also worth noting that, as pointed out by Judge White, "[t]he federal courts have consistently held that venue, under 28 U.S.C. Section 1391, 'is determined at the time the complaint is filed and is not affected by a subsequent change of parties.' It is not unreasonable to assume that our Legislature wished to mirror federal venue laws when drafting Section 508.010." Linthicum, 57 S.W.3d at 870.

***State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001) should be reconsidered because the decision in *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994) severed venue from personal jurisdiction.**

Most of the majority opinion in DePaul concerned itself with consideration of whether "proper venue" remained "a prerequisite to personal jurisdiction" in light of the legislative action which followed *Oney v. Pattison*, 747 S.W.2d 137 (Mo. banc

1988). This Court noted that the word "proper" was removed by the General Assembly in 1989 from §506.110.1(1), and that the Legislature also enacted §476.410 expressly authorizing courts to transfer actions filed in an improper venue to circuits having venue. 870 S.W.2d at 822. This Court observed that while the primary purpose of venue statutes is to provide a convenient, logical and orderly forum for dispute resolution, personal jurisdiction "is about the authority if a court to render judgment over a particular defendant." Id. "Venue and personal jurisdiction address entirely different concerns, the coupling of which was the product of the use of the word 'proper' in Section 506.110.1. By removing 'proper' from Section 506.110.1(1), the Legislature severed the two concepts." Id. This Court overruled a long line of cases starting with *Yates v. Casteel*, 49 S.W.2d 68 (Mo. 1932) and including *State ex rel. O'Keefe v. Brown*, 235 S.W.2d 304 (Mo. banc 1951).

*State ex rel. O'Keefe v. Brown*, 235 S.W.2d 304 (Mo. banc 1951) has been described by one commentator as "an unexplained decision regarding the fusion of venue and personal jurisdiction" which "squarely represents the proposition that filing in a proper venue is a condition precedent to personal jurisdiction." Joseph H. Knitting, *Severing Venue and Personal Jurisdiction in Missouri*, 60 Mo. L. Rev. 505 (Spring 1995). Judge Blackmar, as early as 1983, in his dissent in *Sperry Corporation v. Corcoran*, 657 S.W.2d 619, began to attempt to restore some clarity, consistency, and common sense to venue and joinder issues. He noted that "*State ex rel. O'Keefe v. Brown* . . . is sometimes cited for the proposition that the joinder rule 'is not a venue

statute'." 567 S.W.2d at 623. (Blackmar, J., dissenting). After discussing that case, in which the Court considered the propriety of venue with respect to an *original* petition filed against a motor carrier and an individual defendant and concluded that the general venue statute controlled when a motor carrier is joined with a co-defendant that is not a motor carrier, Judge Blackmar noted: "The case did not hold that the joinder was improper and did not hold that the several defendants of different residence could not be sued in the same county. To the extent that the case suggests that the procedural statutes (now rules) cannot affect the venue of actions, it is inconsistent with the later case of *State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo. banc 1979), and *State ex rel. Garrison Wagner Co. v. Schaaf*, [528 S.W.2d 438 (Mo. banc 1975)]." Id.

Although Judge Blackmar dissented in the Sperry case, his thoughts on the issue were adopted by the majority in the opinion he authored in *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. banc 1986). The Court overruled Sperry and held that when there are several defendants that may share liability for all or part of a plaintiff's claim against them, suit may be brought in the county in which any defendant resides pursuant to §508.010, RSMo.[12] Judge Blackmar noted the "interrelation of the venue statutes and the rules governing joinder of claims." 704 S.W.2d at 673. It was Judge

[12] Relators recognize that *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. banc 1986) appears to continue, without discussion, to assume the application of §508.010 to litigation where the original petition joins individual and corporate defendants.

Blackmar's opinion that "independent grounds for venue [do] not have to exist as to the defendants properly joined in the case" in light of the joinder rules adopted in "the civil code of 1943." Sperry, 657 S.W.2d at 623-624. (Blackmar, J., dissenting). That concept is supported by cases such as State ex rel. Garrison Wagner Co. v. Schaaf, 581 S.W.2d 518 (Mo. banc 1979), holding that a third-party claim does not require a showing of independent grounds for venue, and *State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo. banc 1979), which rejected a corporate defendant's attempt to dismiss for improper venue a libel claim against it which had been joined with libel claims against different broadcasters concerning similar libelous statements. Judge Blackmar noted in Sperry that despite some inconsistency, "most later cases have opted in favor of broad joinder and of a finding of proper venue when closely related claims are joined." 657 S.W.2d at 624. (Blackmar, J., dissenting).

In essence, *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. banc 1986) and the cases it cited in support made it easier to establish proper venue by joining claims, and therefore avoid Yates issues regarding personal jurisdiction, and recognized that with respect to third-party claims, proper venue was not an issue. In DePaul v. Mummert, the Court went beyond those decisions and, once and for all, severed the concepts of venue and personal jurisdiction in Missouri. Bitting points out the relationship between Rule 52.05(a), §507.040, RSMo., and the venue rules and statutes. Mummert not only accepts that relationship, but implicitly solidifies it.

It is important to understand that background in order to appreciate the rationale of the DePaul decision. As long as venue was melded with the concept of personal jurisdiction, proper venue against all defendants the plaintiff brought before the court was necessary. However, after venue and personal jurisdiction were severed, the Court in DePaul was free to apply the statutory language of §508.010 and conclude that, "[b]y the terms of the statute, venue is determined as the case stands when *brought*, not when a motion challenging venue is decided." *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d at 822 (Mo. banc 1994). (Emphasis in original). Filing suit constitutes the commencement of the action and the first step in the process. From there, joinder rules, as well as rules governing third-party practice, substitution of parties, and the dismissal of parties and claims govern, venue having been set initially. As Judge Stith noted in her Linthicum dissent, the addition of a party defendant is not "the bringing of a different suit" but is, instead, "taking place within the same suit, already instituted." 57 S.W.3d 855 at 862. (Stith, J., dissenting).

Relators respectfully submit that in Linthicum the majority disregarded the reason DePaul held that for purposes of §508.010 venue is determined as the case stands when brought, not when the pleadings are amended, and failed to recognize the significance of the impact of joinder rules on venue concepts or the importance of the severance of the issues of venue and personal jurisdiction. By equating adding a party with filing a new suit rather than joinder of a party to an existing one, this Court took a wrong turn, and explored a route no court had previously taken.

The bright line rule adopted in DePaul and cast aside in Linthicum, as observed by Judge Stith, "resulted in predictability, efficiency and stability." 57 S.W.3d at 864. (Stith, J., dissenting). It is certainly fair to the original defendant, or defendants, against whom venue must be established. As to subsequent defendants, joinder rules provide the basis for making a determination as to who can be brought into the existing lawsuit. Rule 52.04[13] ensures that all persons will be joined whose presence is "needed for just adjudication." Rule 52.02(a) provides for the "permissive joinder" of persons as defendant in one action "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action." If a defendant believes that a plaintiff has left some party out of the litigation whom the defendant would like to see added, the defendant may bring in that party under Rule 52.11(a) if that party "is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party." Rule 52.06, entitled "Misjoinder and Non-Joinder of Parties", establishes that "misjoinder of parties is not ground for dismissal of an action" and authorizes the Court to drop or add parties upon the motion of any party or upon the Court's own initiative "at any stage of the action and on such terms as are just."

[13] All references in this brief to "Rules", unless otherwise specified, refer to the Missouri Rules of Civil Procedure.

There clearly is no law requiring a plaintiff to join every defendant against whom they might recover or every claim they might have. There is no such thing in Missouri as "pretensive non-joinder" and this Court repeatedly rejected efforts by defendants after the DePaul decision to force plaintiffs to join defendants whose presence was not required by Rule 52.04. Yet, as noted by Judge Stith, "[w]hile the principle opinion [in Linthicum] never mentions the words 'pretensive non-joinder,' that is the phrase that defendants in this and other cases have used in arguing that this Court should provide for a reconsideration of venue whenever plaintiff adds a defendant after suit has been filed." 57 S.W.3d at 865. (Stith, J., dissenting). The Linthicum rule is "pretensive non-joinder" in sheep's clothing. Instead of forcing or assuming the joinder of parties in determining venue, it simply ignores their non-joinder in the first place. The Linthicum "re-brought" rule is no more appropriate than the same decision based upon "pretensive non-joinder".

There are many reasons why a plaintiff may either elect not to or fail to join all permissible defendants in the original petition. Some defendants may not be known, or the validity of claims against them may not be ascertained, until well into the discovery process. A plaintiff may choose not to include a known defendant against whom a claim could be asserted because that defendant has no assets. The joinder of the first-described defendants after they or the claims against them become known, or joinder of an originally omitted judgment-proof defendant who subsequently obtains assets or is determined to be insured during the litigation, does not mean that their

original omission as defendants was in bad faith, for improper purposes, or to obtain a favorable venue.

There are obviously a number of strategic reasons for adding or dismissing a party that have nothing to do with venue. For example, potential claims for loss of consortium, or against an employee where respondeat superior liability is established against his employer, are two examples of common situations where attorneys have different opinions on strategy, and even within the same litigation, handled by the same attorney, parties in those situations may be added or dropped based upon the way the case develops. For example, an employer may initially deny respondeat superior liability, arguing that the employee did not cause the injury in the scope and course of his employment, in which case the attorney for the plaintiff would probably want to add the employee as a defendant. Again, that decision has nothing to do with venue and the original omission of the employee as a party was not be in bad faith.

Those are but a few examples and not at all a comprehensive list of the reasons why parties might be added or dropped during the course of litigation. By consistently, prior to Linthicum, rejecting claims of "pretensive non-joinder", this Court astutely avoided going down the slippery slope of interpreting attorney motivation and strategic decision making on a case-by-case basis and gave effect to the joinder rules, which not only allow a plaintiff to commence litigation against less than all possible defendants, but provide mechanisms for a plaintiff to add defendants as the litigation proceeds.

While this Court in Linthicum was apparently concerned with the situation of defendants added to litigation with no opportunity to challenge the propriety of venue, that reasoning marks a return to melding venue and jurisdiction and fails to recognize the effect of joinder rules on venue. Moreover, the Court's unprecedented emphasis on "the *residency* of all defendants included in the lawsuit" seems to assume that defendants generally get sued where they reside. 57 S.W.3d at 857. (Emphasis in original). A defendant can always be sued where the cause of action accrued under either §508.010 or §508.040. And, an individual defendant is *always subject to venue in a suit in which it is properly joined anywhere any co-defendant resides within this state*, so it makes no difference as to venue if the individual defendant is included as an original party, and if the defendant is added later, then venue against the co-defendant originally sued should have been appropriate in the first place. Unless the co-defendants reside in the same county, all but one will be sued outside his home venue. Furthermore, although the majority misses the significance of the joinder rules and their interrelationship with the venue statutes, this Court continues to recognize that in third-party practice the venue requirements do not need to be independently complied with, but are established when venue is properly shown in the original pleading. 57 S.W.3d at 858, n.3. Thus, if the individual defendant is added through third-party practice, his residency is irrelevant to a determination of venue and he very well may be joined in litigation pending in a venue away from his home.

Even applying the venue statutes as interpreted by this Court in Linthicum, an individual defendant added to a suit, either through amendment of the pleadings by a plaintiff or a third-party practice, is subject to suit outside of the county of his residence where any of his co-defendants can be sued. Where the co-defendant is a corporation, particularly a corporation that happens to be the individual's employer and the litigation concerns the employee's liability for injuries he causes while working for his employer, the individual defendant should be subject to suit wherever his employer, the corporation, could be sued. There is every bit as much relationship between a co-defendant corporation running railroad tracks and doing business in the City of St. Louis and an individual co-defendant residing elsewhere as there is between that same individual defendant and an individual co-defendant who happens to reside in the City of St. Louis. It makes no difference to the individual defendant who lives outside the venue of the litigation.

Relators respectfully submit that Linthicum is a classic example of "bad facts making bad law" and is a cure worse than the ailment. However well intended, Linthicum should be considered a failed experiment that in practice has proven antagonistic to the purpose of Missouri venue statutes of providing a convenient, logical and orderly forum for the resolution of disputes. Important and significant public policy determinations have been made by the Legislature and expressed in the plain language of the venue statutes, and any change in those policies is up to the Legislature as well. As Judge Stith wrote:

> Venue is a very complex issue, which requires consideration of competing interests in a wide variety of contexts. This task is better suited to the Legislature than to adjudication on a case-by-case basis. That is why the Legislature, not the court system, has traditionally balanced the competing policy concerns in this area, and chosen the approach that it finds best serves the public.

57 S.W.3d at 867. (Stith, J., dissenting).

Relators can understand that this Court may be reluctant to cast aside an opinion handed down not quite a year ago. In fact, Relators agree that this Court should respect precedent and would be troubled if it did not. However, there are times when mistakes must be corrected, and this is one of them.

The fact that Linthicum was not this Court's ideal solution to the venue problems confronting it is evident from reading the opinion itself. Not only was the decision four to three, with three separate dissenting opinions, and the majority opinion handed down *per curiam*, but the views expressed in the *per curiam* opinion did not agree with those earlier espoused by two of the judges in the Linthicum majority.

While Linthicum establishes a "re-brought" rule that determines venue whenever a plaintiff brings a defendant into a lawsuit, Judge Limbaugh, in a dissenting opinion joined by Judge Price, concluded in *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994), that venue "should be determined

according to the presence and status of the parties at the time the court rules on the merits of the challenge." Id. at 823 (Limbaugh, J., dissenting). While Linthicum holds that Mummert "still applies whenever a defendant is dismissed from a lawsuit rather than added to it," 57 S.W.3d at 858, Judges Limbaugh and Price both espoused, in Mummert, permitting "curative dismissal of a party defendant". 870 S.W.2d at 823 (Limbaugh, J., dissenting). It would appear from the above that the *per curiam* opinion in Linthicum fully expresses and conforms to the views of, *at most*, two judges; Judge Benton, whom it should be noted joined the majority in both Mummert and Linthicum, and Judge Holstein, who, likewise, joined in both opinions but is no longer on this Court.

Under these circumstances, and for the reasons expressed above, Relators respectfully submit that this Court should reconsider its opinion in Linthicum and return to the bright line rule in established in Mummert which gives full effect to the statutory language of the venue statutes and recognizes the Legislature's intent to have a single determination of venue at the initiation of the suit, resulting in predictability, efficiency and stability.

## IV. RELATORS ARE ENTITLED TO A PERMANENT ORDER OF PROHIBITION AND/OR MANDAMUS PROHIBITING RESPONDENT, THE HONORABLE BARBARA W. WALLACE, FROM EXERCISING JURISDICTION OVER THE UNDERLYING CASE EXCEPT TO RETRANSFER IT TO THE CITY OF ST. LOUIS AND FURTHER ORDERING RESPONDENT, THE HONORABLE MARGARET M. NEILL, TO VACATE HER MARCH 18, 2002 ORDER TRANSFERRING VENUE FROM THE CITY OF ST. LOUIS CIRCUIT COURT, BECAUSE VENUE IS PROPER IN THE CITY OF ST. LOUIS IN THAT THE UNDERLYING CASE WAS ORIGINALLY BROUGHT AGAINST BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, A SINGLE CORPORATE DEFENDANT OPERATING A RAILROAD AND DOING BUSINESS IN THE CITY OF ST. LOUIS, BURLINGTON NORTHERN IS CURRENTLY THE SOLE DEFENDANT, AND RESPONDENT JUDGE NEILL MISAPPLIED AND/OR MISINTERPRETED THIS COURT'S DECISION IN ***STATE EX REL. LINTHICUM V. CALVIN*****, 57 S.W.3D 855 (MO. BANC 2001) IN FINDING ST. LOUIS CITY VENUE IMPROPER AGAINST BURLINGTON NORTHERN.**

Under Missouri venue law, Defendant Burlington Northern has no legitimate objection to this case being tried in the City of St. Louis , where it has admitted it does

business and owns, controls, or operates a railroad, and where, therefore, the Legislature has determined the railroad may be sued under §508.040. Instead, Burlington Northern is seeking to raise issues that pertain to a defendant no longer in the case and is attempting to reargue a dismissed defendant's motion. It is relying on this Court's opinion in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001), a case pertaining to subsequently added defendants, although it is an original defendant. Furthermore, the arguments advanced by Burlington Northern and adopted by Respondent Judge Neill in her order transferring venue involve a misreading and/or misapplication of this Court's opinions in Linthicum and *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994). Under both Linthicum and Mummert, "[a] suit is brought against the original defendants when the petition is initially filed . . . ." 57 S.W.3d at 858. When suit was filed against Burlington Northern, there is no question venue was proper against Burlington Northern in the Circuit Court for the City of St. Louis.

It is appropriate to begin analysis under this point with consideration and discussion of this Court's opinions in Mummert and Linthicum.

In *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1994), this Court interpreted §508.010 to mean that, "[v]enue is determined as the case stands when brought . . . ." Id. at 823. In that case, one of the original defendants challenged venue in the City of St. Louis under §508.010, arguing that neither the individual nor corporate defendants resided within the City of St. Louis and that the

plaintiffs' cause of action did not accrue there. In response to that motion, the plaintiffs dismissed the individual defendant and argued that venue was proper in the City of St. Louis because §508.040 now applied to the remaining corporate defendants. This Court determined venue as of the time suit was brought against the original defendant challenging venue, at which time §508.010 applied to the case, and found that venue was in fact improper and that the plaintiffs' subsequent dismissal could not remedy the original defect in the venue asserted under plaintiffs' original pleading.

The issue of venue with respect to a subsequently added defendant was recently addressed by this Court in *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). This Court did not overrule Mummert, and, in fact, noted that its Linthicum holding was not contrary to Mummert. Id. at 858. Instead, this Court concluded that:

> Although a suit is brought against the original defendants when the petition is initially filed, in like manner, it is also brought against subsequent defendants when they are added to the lawsuit by amendment.

Id. (emphasis added). This Court criticized the circuit court's conclusion that the word "brought" under the statute applies only when the petition is originally brought, noting that it "assumed a temporal distinction that conferred different venue rights on Missouri defendants depending on whether the plaintiff initially named or subsequently added them to the lawsuit." Id. By concluding that a suit is brought against original defendants when the petition is initially filed, and is brought against subsequent

defendants when they are added to the lawsuit by amendment, this Court allowed subsequent defendants to raise venue issues even though they were not in the case when originally brought, and stated "this interpretation protects all party defendants equally and gives effect to the intent of the Legislature in enacting §508.010(3)." Id.

What apparently concerned this Court in Linthicum was the effect of the Mummert rule on *subsequent* defendants, an issue which was not addressed in Mummert. The situation this Court wanted to avoid was described as follows:

> Under [the circuit court's] interpretation, a plaintiff could sue a Missouri resident in any of over one hundred venues by simply suing a non-resident under Section 508.010(4), and then amending the original petition to include the Missouri resident.

Id. at 857.

It does not appear to have been the non-resident in that hypothetical with whom this Court was concerned; it was the Missouri resident who was denied any chance to contest a venue that may be inappropriate or improper as to the Missouri resident. In this case, Burlington Northern seeks to assert the rights of the Missouri resident added to the litigation in that hypothetical. However, numerous factors distinguish Burlington Northern from the individual Missouri resident in Linthicum. First, Burlington Northern is a foreign corporation subject to venue under §508.040, not an individual Missouri resident to whom §508.010 applies. Second, Burlington Northern was an original defendant, not one added to the litigation, and had an opportunity to challenge venue

based upon the original petition in which it was sued. It did not do so because venue against it was clearly proper under the original petition in the City of St. Louis, but the fact remains that it could have, and no doubt would have, filed a motion to transfer if the original venue was not proper against it and would have relied on Mummert to prevent plaintiffs from correcting any defects in the venue alleged in the original petition. Finally, and most significant, unlike the subsequently added Missouri residents in the Linthicum hypothetical, who would have been subject to suit in "any of over 100 venues" because a non-resident was sued first, Burlington Northern has not been subjected to any increased or expanded exposure to various venues beyond what it could expect under §508.040. Instead, Burlington Northern, in contrast to those Missouri residents in Linthicum, is seeking to take advantage of a dismissed co-defendant to narrow the venues in which it may be sued and avoid a statutorily appropriate venue.

In essence, Burlington Northern is arguing that even though it is not a subsequent defendant but is instead the original defendant, and despite the clear language of Linthicum indicating a suit is brought against original defendants when first filed, the suit was not brought against it when the petition was filed against it, but was instead only brought against it when its engineer was added to the case.

That interpretation not only does violence to the plain language of Linthicum quoted above and the Mummert holding with respect to original defendants that Linthicum reaffirms, but seeks to go where no court has gone before: a hypothetical "halfway back" situation which neither looks at the original pleading brought against the

defendant raising the challenge to venue nor considers the circumstances of the case that exist when the motion is filed and argued. Instead, Burlington Northern assumes the presence of a defendant that wasn't there when the suit was brought and isn't there as the case presently stands, and would apply §508.010, the general venue statute, to a single corporate defendant.

Furthermore, Linthicum *at no time involved a single corporate defendant or §508.040*, the venue statute under which this case was brought against Defendant Burlington Northern, but instead involved only the general venue statute, 508.010. The litigation in Linthicum was originally filed against multiple defendants in another venue, St. Francois County, where it was dismissed after pending for two years, and then almost immediately refiled in the Circuit Court for the City of St. Louis against a single non-resident individual defendant. Here, this litigation has, until the March 18, 2002 Order, always been in the Circuit Court for the City of St. Louis, where it had been pending since November 2000 and, until the recent dispute over venue, was set for trial September 16, 2002 by agreement of all parties.

It could be argued Burlington Northern is attempting to manipulate the venue statutes here. It has not only unsuccessfully attempted to change venue on several occasions, then tried to remove this case to federal court, but is now seeking to "piggy back" onto the motion of a dismissed defendant, and, in essence, assert venue was inappropriate as to the dismissed defendant who, as a subsequently added defendant, might be able to raise issues under Linthicum if still in the case. Burlington Northern

lacks standing to do so. The opportunity to contest venue has been repeatedly said to be a "mere personal privilege", see, e.g., *Bellon Wrecking and Salvage Company v. David Orf, Inc., et al.*, 983 S.W.2d 541, 547 (Mo. App. 1998), and Drapp's venue arguments, which are personal to Drapp, cannot be raised by Burlington Northern.

In light of the above, Respondent Judge Neill's order granting transfer under these circumstances was clearly improper, and Respondent Judge Wallace lacks jurisdiction under that improper transfer to allow the underlying litigation to continue in St. Louis County. Relators respectfully request that this Court issue its Writ of Prohibition and Mandamus ordering Respondent Judge Wallace to retransfer the underlying case to the Circuit Court for the City of St. Louis and Respondent Judge Neill to vacate her March 18, 2002 Order transferring venue to the Circuit Court of St. Louis County.

## CONCLUSION

Relators respectfully submit there is little question that Respondent, the Honorable Margaret M. Neill, acted in excess of her jurisdiction in transferring the underlying case from the City of St. Louis Circuit Court nearly two and a half years after suit was brought against the Burlington Northern and Santa Fe Railway Company. The requested permanent order of prohibition and/or mandamus prohibiting Judge Wallace from exercising jurisdiction except to retransfer the underlying case to the City of St. Louis should be granted. The real question before this Court is what resulting impact this Court's opinion will have upon future parties and litigation.

There are several ways Respondent Judge Neill's order was in excess of her jurisdiction. It is possible to conclude, as discussed in Point IV, that Respondent misapplied and misinterpreted this Court's decision in State ex rel. Linthicum v. Calvin, and distinguish the underlying case from that precedent. That approach would, however, take this Court, and all courts of Missouri, farther down the road to case-by-case adjudications in venue litigation and further from enforcing the bright lines established by the venue statutes in which the Legislature expressed its determination of the appropriate public policy of this State.

This Court could end the practice of tossing aside §508.040 whenever an individual defendant is joined in litigation with a co-defendant corporation and give that statute effect. This could be done directly as discussed in Point I, or indirectly by

allowing §508.040 to describe and define the "residence" of a foreign corporation for purposes of determining where it resides under §508.010, as discussed in Point II. Such a holding would give effect to both §508.010 and §508.040 and the legislative intent expressed therein and would place the underlying litigation back in the City of St. Louis where it belongs. However, once again, the Court could do more to reestablish convenience, logic and order, and, most of all, certainty to the process of determining venue.

With all due respect to this Court, and fully recognizing that the facts in Linthicum would have caused legitimate concern, Relators submit that Linthicum was the wrong road to take. When a traveler, having taken a fork in a path, at last concludes the fork chosen does not lead to where he or she desires to go, the traveler is faced with a decision. Perhaps, noting another fork in the road, the traveler can take one of those paths and hope that it leads him or her to the correct destination. Or the traveler could abandon the path altogether and head out into the woods, even less sure of the prospects ahead. Or, recognizing where the journey went wrong, the traveler could return to the spot he or she went astray, more confident now of the correct decision.

Under these circumstances and for the reasons expressed in Relators' Brief, Relators respectfully submit that this Court should return to the bright line rule established in Mummert, which gives full effect to the language of the venue statutes

and recognizes the Legislature's intent to have a single determination of venue at the initiation of the suit, resulting in predictability, efficiency and stability.

Respectfully Submitted,

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## CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This brief includes the information required by Rule 55.03, including the undersigned's address, Missouri Bar number, telephone number, and fax number;

2. This brief complies with the limitations contained in Rule 84.06(b);

3. This brief contains 20,079 words according to the word-processing system used to prepare the brief; and

4. This brief contains 1,903 lines of type according to the line count of the word-processing system used to prepare the brief.

5. Microsoft Word was used to prepare Relators' brief.

6. The diskette provided with this brief has been scanned for viruses and is virus free.

_____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed via U.S. Mail, first-class, postage prepaid, on this 26th day of July, 2002, to:

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